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In The

Supreme Court of the United States

October Term, 1971

No. 71-1438

DANIEL CECERE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Daniel Cecere, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on April 4, 1972, which judgment affirmed a judgment of sentence of the United States District Court for the District of New Jersey filed March 4, 1970.

Citations to Opinions Below

Petitioner's conviction was initially reversed unanimously by a panel of the Court of Appeals. That opinion, entitled United States v. De Carlo, may be found at 445 F.2d 911 (3d Cir. 1971). Thereafter, the Government petitioned for rehearing which was granted en banc. The opinion of the Court of Appeals en banc has not as ye been officially reported. Both opinions are printed in Appendix B, infra.

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the reception in evidence of a highly incriminating letter written to the FBI by the deceased victim of an extortionate credit transaction, violated petitioner's right of confrontation under the Sixth Amendment, and were not cautionary instructions ineffective in limiting the admissibility of the letter to the victim's state of mind?

2. Whether the reception in evidence of the letter and other extensive hearsay statements of the deceased, all of which were highly incriminatory, violated petitioner's rights under the due process clause of the Fifth Amendment, and were not limiting instructions ineffective to cure the resulting prejudice?

3. Whether the so-called state of mind exception to the hearsay rule was applicable and correctly applied in this case where the victim, whose state of mind was in issue, did not testify but was quoted extensively by other witnesses?

4. Whether the statute itself, in 18 U.S.C. §892(c) and §894(c), does not provide the sole and exclusive method of proving the state of mind of an unavailable debtor in an extortionate credit transaction?

5. Whether the admission, without limiting instruction, of evidence that the deceased victim of an extortionate credit transaction died of acute arsenic poisoning, where there was no evidence connecting any defendant with the death, violated petitioner's right to due process of law?

6. Whether an indictment which merely incorporates definitions with numerous sub-parts by citation to the statutory section, without detailing which parts of the definitions are applicable to the crime charged, violates Rule 7(f), Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments?

Statutes Involved

The statutory provisions involved are 18 U.S.C. §§891, 892 and 894. They are printed in Appendix A, infra.

Statement

Petitioner was convicted, along with Angelo De Carlo, following a three week jury trial, of

violations of 18 U.S.C. §§892 and 894, prohibiting extortionate credit transactions. He was sentenced to 12 years in prison and has been serving that sentence since March 4, 1970.

The main witness for the Government was Gerald Martin Zelmanowitz a securities analyst who also traded in arbitrage, the purchasing of foreign held securities overseas and selling of them in the United States within a very short period of time. The difference in prices between the United States and foreign securities markets enabled one to make a profit on this type of sale (101a).* The profit that could be obtained, however, was small and in order to make large sums of money it was necessary that one traded in a large volume of stock.

Late in the summer of 1967, Zelmanowitz entered into a financial arrangement with Louis B. Saperstein. Zelmanowitz was seeking additional funds for the purchase of foreign securities in Europe and he approached Saperstein to make an investment with him (103a). As a result of a meeting, an arrangement was reached whereby Saperstein agreed to invest $50,000 with Zelmanowitz for the purpose of arbitrage.

Zelmanowitz, Saperstein and Saperstein's son went to the Union Bank of Switzerland and made a deposit of $25,000 on October 24, 1967 (108a). Immediately thereafter Zelmanowitz began to trade

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* "a" references were to pages of the appendix filed with the Court of Appeals and certified to this Court as part of the record below.

"aa", "ab" and "ac" references are, respectively, to Appendices A, B and C to this petition.

in the account. Saperstein was immediately enthused about the profits that could be made by arbitrage and Zelmanowitz told him that if he had more money he could make more profit. Saperstein suggested that they might be able to obtain some money and took Zelmanowitz to meet De Carlo (113a). The meeting took place somewhere between October 24 and November 9 in a parking lot behind Wyland's Restaurant in Mountainside, New Jersey (114a). At the meeting Zelmanowitz explained the business of arbitrage to De Carlo and Saperstein asked for a $100,000 loan to be used in the business. De Carlo referred them to petitioner, Cecere, and told them that Cecere would handle the financial end of the matter (116a-118a). The following evening Zelmanowitz met Cecere (168a-169a), and explained the business of arbitrage to him (170a). Saperstein asked Cecere for $100,000 (171a). Cecere was interested in the business but instead of loaning the money to Saperstein and Zelmanowitz he indicated that he wanted to become a partner. He said that he, DeCarlo and Polverino (originally a co-defendant) would put up $100,000 and, in addition, $50,000 which had previously been loaned to Saperstein would be recalled and also put into the arbitrage investment, thus making a total investment of $150,000 (171a). Saperstein stated that he had been paying vigorish, or interest, on the $50,000 loan and if Cecere and the others became partners he felt that he should get back the interest of $800 a week that he had been paying. Cecere said that if the operation were successful and if there were sufficient money earned they would discuss the $800 a week return at a later time (172a). The new arrangement made was that Saperstein and Zelmanowitz would get 50% of the profits and

DeCarlo, Polverino and Cecere would get the remaining 50% (172a). Cecere then left the room and returned with $50,000. The next morning Zelmanowitz went with Saperstein to pick up the remaining $50,000 (174a-175a).

Thereafter, Zelmanowitz continued to trade in the account (178a-185a). There were sixteen days on which trades were made and the profit realized was $85,000 (186a). Between October 25, 1967 and January 1, 1968, Zelmanowitz testified that he met many times with DeCarlo, Cecere and Polverino and discussed the trades with them (186a-187a), showing them confirmation slips in order that they could see how the account was doing (189a). Zelmanowitz continued to trade in the account through most of December 1967. At a point in December, however, trading ceased due to a dispute with the United States Internal Revenue Service. IRS refused to issue certain tax equalization forms to Zelmanowitz. As a result, the accounts both in New York and Switzerland were frozen and Zelmanowitz was not able to trade (197a-198a). During the first week of January 1968, Saperstein came to Zelmanowitz' home, stating that he was very heavily indebted and was behind in some interest payments (218a-220a), and asking to withdraw the profit from the arbitrage account. Zelmanowitz approved the withdrawal of $40,000, which would have been roughly that share of the profit belonging to Zelmanowitz and Saperstein.

On September 13, Zelmanowitz accompanied Cecere and another man to New York where they found Saperstein, who had been missing, and brought him back to New Jersey (258a-269a), to the Barn,

a house in the rear of Wyland's Restaurant. There Zelmanowitz witnessed Saperstein being beaten by Cecere and Polverino (269a-270a). Afterwards, DeCarlo said that Saperstein owed him, Cecere and Polverino, over $100,000 and that he owed he and Landusco (also an original co-defendant) over $100,000. He told Saperstein to bring $5,000 a week to be divided among the two loans (274a), and that he would pay all of the money by December 13, or he would be dead (275a).

It was stipulated that Saperstein died on November 26, 1968 (287a-295a). Nevertheless, the Court permitted the Government to prove, through the State Medical Examiner, that Saperstein died of "acute arsenic poisoning" (423a).

During the trial, Zelmanowitz was permitted to relate numerous statements made by Saperstein, examples of which are as follows:

> "Mr. Saperstein said that he was very heavily indebted and behind in some vigorish payments to Mr. DeCarlo... [219a]
>
> * * * *
>
> "Mr Saperstein told me that he was in fear of bodily harm, for his life; he told me that he was greatly indebted to certain people; that he owed an enormous sum of money to them, and he had to have funds desperately; and that due to the stopping of IRS of our account and the blocking and freezing of our money in Switzerland, great sources of his income had been cut off, and if he didn't have funds immediately he was afraid he may

> be killed. At this time he referred to the moneys in the Swiss account that we had earned up to this point. There was approximately $85,000 in profit in the account and he wished to take this money out. I told him that he can withdraw and use the funds that I earned as profit, and his own, which came to a sum of $40,000 approximately. I, in turn, allowed him to withdraw $40,000 to meet vigorish notes and to pay personal bills and debts that he had incurred. He told me that his business couldn't afford to take care of all these personal bills and the vigorish on the loans that he had and that he had gotten greatly in debt" (222a).[1]

Sometime shortly before his death Saperstein mailed a letter to the FBI which was received on November 26, the day he died. The following portion of the letter was admitted into evidence:

> "Federal Bureau of Investigation, Newark, New Jersey. Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968, I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, De Carlo's headquarters. I was then told and given 3 months until December 13, 1968, to pay the entire accumulated amount under threat of death. Cecere, De Carlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family — I am sure they mean to carry out this threat.

1. Other conversations may be found at 231a, 247a, 250a-251a, 252a-253a, 253a-254a, 258a-259a, 285a.

"Last night from my home I called De Carlo and pleaded for time but to no avail. Over the phone De Carlo stated unless further monies was paid the threats would be carried out.

[Signed] Louis Saperstein" (574a).

Patrolman James Ambrosky of the East Orange, New Jersey, Police Department was permitted to testify that on November 25, 1968, he went to the apartment of Louis Saperstein in East Orange (425a-426a), where Saperstein told him "there was a man in the hallway ringing his doorbell with a gun, and he wants to come in the apartment and kill him" (427a). Saperstein further told him that the man "has red hair, his name is Red and he is after me, and he wants to kill me" (427a). It had already been brought out during the trial that the petitioner Cecere is often called "Red", due to his red hair.

All of this evidence was admitted limited to the issue of Saperstein's "state of mind" (200a-210a) and the Court so instructed the jury (806a, 809a, 811a, 839a).[2] This evidence was continually referred to during the Government's summation (716a-717a, 722a-724a, 725a-726a) including a complete reading of the Saperstein letter (744a-745a), and a reading of the entire transcript of Patrolman Ambrosky's conversation with Saperstein (746a). The Court also referred to this

2. The Court took the highly unusual step of having each juror attest, on a written interrogatory, that they had followed the Court's limiting instructions (812a-814a, 818a-819a, 847a-848a, 940a).

evidence extensively in its charge, including a reading from the letter (809a).

Reasons for Granting the Writ

1. The admission into evidence in this case of the extremely incriminatory letter written by the deceased, Saperstein, to the FBI poses a highly significant constitutional issue involving the interrelationship of several recent decisions of this Court concerning the Sixth Amendment. In Dutton v. Evans, 400 U.S. 74, 86, 27 L. Ed.2d 213, 225-226, 91 S. Ct. 210 (1970), this Court held that while "the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots," the two could not be "equated." That result had been presaged by the earlier decision in California v. Green, 399 U.S. 149, 155-156, 26 L. Ed.2d 489, 495, 90 S. Ct. 1930 (1970). The plurality opinion in Dutton concluded that since the "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the 'trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement,'" 400 U.S. at 89, 27 L. Ed.2d at 227, each case must be decided on its own facts. 400 U.S. at 86, 27 L. Ed.2d at 226. In finding no violation of the Confrontation Clause, the plurality noted the following factors, among others: (1) the hearsay evidence involved was not in any sense "crucial" or "devastating"; (2) the hearsay statement contained no express assertion about past fact and, consequently, carried on its face a warning to the jury against giving the statement undue weight; (3) the statement was spontaneous and against the penal interest of the declarant. 400

U.S. at 87-89, 27 L. Ed.2d at 226-227. In his concurring opinion, Mr. Justice Harlan concluded that there was no error, employing a two-step process. First, he found no violation of the Confrontation Clause since it prescribed only a required mode of procedure; that the accused be present and have the right to cross-examine the witness against him. 400 U.S. at 94, 27 L. Ed.2d at 230. Next, Mr. Justice Harlan would have judged the hearsay evidence by a due process standard, weighing the necessity for the type of evidence involved "against the danger that a jury will give it undue credit" in order to decide if its admission "would increase the likelihood of just determinations of truth." 400 U.S. at 99, 27 L. Ed.2d at 233.[3]

Turning to the present case, it seems clear that admission of the Saperstein letter violated the Confrontation Clause as construed in Dutton. There can be no doubt that the letter was "crucial" and "devastating," going as it did to the heart of the charges; it did contain assertions about past fact and was neither spontaneous nor against the declarant's penal interest. Judged by Mr. Justice Harlan's standards, the due process question need not even be reached since there was no actual confrontation with the declarant.[4] The Court

3. Mr. Justice Blackmun, joined by the Chief Justice, concurred on the basis that the error, if any, was harmless beyond a reasonable doubt. 400 U.S. at 93, 27 L. Ed.2d at 229. Mr. Justice Marshall, joined by Justices Black, Douglas and Brennan, dissented, finding a clear violation of the Confrontation Clause under "settled Sixth and Fourteenth Amendment law" 400 U.S. 110, 27 L. Ed.2d at 239.

4. This distinguishes the letter from the conversations related by Zelmanowitz.

of Appeals, however, brushed aside the Confrontation issue on the basis that the letter was not truly hearsay since it was not admitted for the truth of the matters therein but only on the limited issue of Saperstein's state of mind (31ab, fn. 5).[5] In so concluding, the Court did note that the letter "could have value both for the truth of the matter [it] contain[s] and for the state of mind of the declarant" (29ab); that "had the letter been admitted for the truth of its assertions, it would have tended to show that Saperstein was beaten on September 13 and in fact owed De Carlo and Cecere a sum of money" (30ab);[6] and that "one unversed in the law would be tempted to read the letter for the truth of its statements, and without being told specifically otherwise, would no doubt do so" (43ab-44ab).

The Sixth Amendment issue is not, however, so readily resolved, for in Dutton v. Evans, supra, Mr. Justice Marshall noted that the definition of hearsay as an "out-of-court statement presented for the truth of the matter stated" has never been "adopted by this Court for confrontation purposes" 400 U.S. at 105, fn. 7, 27 L. Ed.2d at 236. Relying upon Bruton v. United States, 391 U.S. 123, 136, 20 L. Ed.2d 475, 485, 88 S. Ct. 1620 (1968), Mr. Justice Marshall stated that "admission in the absence of cross-examination of certain types

5. The as yet unpublished opinion of the Court of Appeals is printed in Appendix B, infra commencing at p. 23a. The earlier panel opinion of the Court of Appeals, though officially reported, is likewise printed in the Appendix commencing at 7a.

6. The only other evidence of these essential elements came from Zelmanowitz.

of suspect and highly damaging statements is one of the 'threats to a fair trial' against which 'the Confrontation Clause was directed.'" It is this interrelationship and, indeed, tension between the principles of Bruton and those of Dutton which pose the important constitutional issue in this case. The Court of Appeals here found that "the jury was capable of drawing the required distinction in order that the defendants would not be unduly prejudiced" (33ab). Bruton, however, was premised upon the conclusion that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequence of a failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." 391 U.S. at 135, 20 L. Ed.2d at 484. The Court there went on to conclude that "we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination" 391 U.S. at 137, 20 L. Ed.2d at 485. Likewise, Mr. Justice Stewart in his concurring opinion, stated that a "basic premise of the Confrontation Clause ... is that certain kinds of hearsay (cases omitted) are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give." 391 U.S. at 138, 20 L. Ed.2d at 486.

Precisely the same can be said of the attempt to limit the jury's consideration of the Saperstein letter in this case. Its content was so critical and so highly prejudicial in the context of this trial that a jury could not be fairly expected to use it for a limited purpose, no matter what

assurances they gave. Once the futility of the limiting instruction is recognized, pursuant to Bruton,[7] the letter becomes pure hearsay and its admission violative of the Confrontation Clause, as construed in Dutton v. Evans, supra. To correct this manifest error and to further explore the meaning of Dutton[8] in a context where the hearsay evidence is critical, as well as to delineate the interrelationship of Dutton and Bruton, certiorari should be granted in this case.

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7. The futility of limiting instructions is pointed out, albeit quite unintentionally, by the concurring opinion of Chief Judge Seitz in this case (44ab-45ab). In concluding that the admission of evidence that Saperstein died of arsenic poisoning was harmless error, Judge Seitz looked to other evidence "properly before the jury" as being quite damaging on the same issue (the cause of Saperstein's death). Foremost among this other evidence was Saperstein's letter disclosing that the defendants had threatened to kill him and his family. Concluding, Judge Seitz said:

> "Regardless of the evidence of arsenic poisoning the jury could well have concluded that defendants were in fact responsible for Saperstein's death. Realistically, no instructions could have prevented the jurors from drawing this inference" (45ab).

Thus, Judge Seitz himself gave considerable weight, on a critical issue, to the truth of the matter stated in the letter, realizing that a jury would likewise do so.

8. One commentator has said that "meaning of the confrontation clause is no longer clear" after Dutton. Read, The New Confrontation-Hearsay Dilemma, 45 So. Calif. L. Rev. 1, 2 (1972). This conclusion seems justified in the light of state court decisions attempting to apply the reasoning of Dutton. Compare State v. Lunn, 82 N. Mex. 526, 484 P.2d 368 (N.M. Ct. App. 1971), with Commonwealth v. Thomas, 443 Pa. 234, 279 A.2d 20 (Pa. Sup. Ct. 1971).

2. The admission of the Saperstein letter and the numerous oral statements of Saperstein related by Zelmanowitz, as well as Patrolman Ambrosky, also violated petitioner's rights under the due process clause of the Fifth Amendment. While noting that

> "certain evidence may be capable of inflaming the passions of the jury to the point that when the probative value of the evidence is weighed against the potential prejudice, it should be excluded notwithstanding it would otherwise be admissible" (31ab-32ab).

The Court of Appeals reasoned that,

> "undue prejudice to the defendants from the admission of the Saperstein letter could only arise if the jury considered the statements therein for the truth of their assertions rather than for their value as showing Saperstein's state of mind" (32ab).

In so concluding, however, the Court once again flew in the face of Bruton v. United States, supra, without ever once even mentioning the case in its opinion. Petitioner suggests that the letter, particularly, was so harmful that the jury could not help but be influenced by the facts in the letter, especially insofar as it corroborated Zelmanowitz who gave the only direct testimony concerning the same matters, which were critical elements of the prosecution. The admission of the conversations related by Zelmanowitz and, in one instance, by Patrolman Ambrosky, seriously compounded the prejudice flowing from the letter, especially in light of the frequency and length of these recitals.

As the Court of Appeals conceded, if the jury could not limit its consideration of this evidence then undue prejudice to petitioner clearly existed. This evidence was so interspersed and interrelated with Zelmanowitz' non-hearsay testimony that it was well nigh impossible to "segregate [the] evidence into separate intellectual boxes ...."[9] If the jury was unable to perform this "mental gymnastic," Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932), as Bruton clearly implies, then petitioner was denied a fair trial.[10] Indeed, there is a serious question here of whether the Court of Appeals even applied the correct standard in judging the effectiveness of limiting instructions, since it did not even refer to Bruton in its opinion.

3. The admission of this hearsay testimony also presents an important issue of federal evidentiary law which this Court should review pursuant to its supervisory power over federal courts. Dutton v. Evans, 400 U.S. at 82, 27 L. Ed.2d at 223. The Saperstein letter and the testimony relating statements made by Saperstein were admitted pursuant to a so-called "state of mind" exception to the hearsay rule. This exception apparently originated in prosecutions arising under

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9. People v. Aranda, 63 Cal.2d 518, 529, 407 P.2d 264, 271, 272 (Sup. Ct. 1965), quoted in Bruton v. United States, 391 U.S. at 131, 20 L. Ed.2d at 482.

10. It was by this due process standard that Mr. Justice Harlan would have judged hearsay evidence. Dutton v. Evans, 400 U.S. at 99, 27 L. Ed.2d at 233.

the Hobbs Act, 18 U.S.C. §1951[11] and was, without any discussion of the point, assumed by the Court below to be applicable in this case (38ab fn. 12). Of course, the question of whether this evidence falls within an "established hearsay exception," Dutton v. Evans, 400 U.S. at 80, 27 L. Ed.2d at 222, is basic to the confrontation and due process arguments discussed heretofore.

Analysis of the Hobbs Act decisions reveals, however, that they are all distinguishable from the present case in one critically significant respect. In each of those cases the hearsay testimony was admitted either to corroborate testimony already received from the individual who had been directly subject to the extortionate threats, United States v. Stirone, supra; Carbo v. United States, supra, or involved a situation where the threats had been made upon many members of a large group all of whom, due to the nature of their business, had good reason to discuss the threats with each other. United States v. Varlack, supra (company officials); United States v. Kennedy, supra (truck drivers); Nick v. United States, supra (committee representing independent movie exhibitors). Because of the presence of one or the other of these factors the testimony was apparently deemed reliable enough to qualify as an exception to the hearsay rule. Indeed, in United States v. Kennedy, supra, Judge Friendly noted this very point and concluded, after analyzing

11. Carbo v. United States, 314 F.2d 718, 745 (9th Cir. 1963); United States v. Stirone, 311 F.2d 277, 281 (3d Cir. 1962); United States v. Varlack, 225 F.2d 665, 673 (2d Cir. 1955); Nick v. United States, 122 F.2d 660 (8th Cir. 1941), cert. denied 314 U.S. 687 (1941); United States v. Kennedy, 291 F.2d 457, 458 (2d Cir. 1961).

all of the cases cited herein, that such hearsay should only be admitted if the subject of the threat also testifies.[12] Judge Friendly's concern has become manifest in the instant trial where petitioner was literally inundated with hearsay allegedly qualifying under this exception to the general rule. Here, the deceased Saperstein became a very real witness against petitioner through both his own writing[13] and the mouths of others.

The proliferation of cases under this new federal statute, as well as under the Hobbs Act, points up the serious problem involved in the admissibility of this type of evidence. Considering the highly prejudicial nature of the evidence this Court should pass upon the existence of such an "exception" in the federal law of evidence and, if it does exist, the conditions under which it should be received.

4. Wholly apart from the issue of whether a state of mind exception exists, at least as it was applied in this case, is the important question of

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12. The absence of direct testimony as to the "victim's" state of mind would not prevent successful prosecutions under this Act since Congress expressly provided an alternate means of proof where such "direct evidence" is not available. 18 U.S.C. §892(c), §894(c).

13. With respect to the letter, indicia of trustworthiness, which lie at the foundation of every hearsay exception, were notably absent. The letter was not spontaneous but was obviously written after reflection and the nature of the addressee, the FBI, indicates that it was written out of a revengeful feeling against petitioner, with the clear intention of getting him in trouble. Feelings of ill-will and hostility have been held to require exclusion of such hearsay evidence as dying declarations. 5 Wigmore Evidence, (3d Ed. 1940), §1443.

whether Congress did not intend to limit the method of proving the state of mind of an unavailable victim. Sections 892(c) and 894(c) of this statute (18 U.S.C. §891 et seq.) provide that if direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, the court may allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension of credit and at the time of the collection or attempt at collection. While we do not think highly of convicting a man on the basis of his reputation, and assuming the provision to be constitutional, it is what Congress intended where direct proof is not available to prove one element of the crime, and it would at least require the prosecutor to produce a witness who could be cross-examined by defense counsel. Hearsay evidence, other than testimony as to a defendant's reputation, is not authorized by this Act.

The legislative history of the Consumer Credit Protection Act supports this contention. The Conference Report on the bill (Conference Report No. 1397, U.S. Code Congressional and Administrative News, 90th Congress, Second Session, 1968, at p. 2021) is careful to make a point of the fact that only subsection 892(b), which deals with the actual extension of credit itself, is non-exclusive. The heading "non-exclusiveness of Section 892(b)" omits 892(c). If the Conference Committee of the Congress had intended to allow other hearsay evidence of state of mind, in addition to evidence of reputation, it would have likewise included in subsection 892(c) a provision making

it also non-exclusive. Moreover, the Conference Report indicates that the purpose of subsection 892(c) is to cover the exact situation as in the case at bar, for it begins the discussion of subsection 892(c) with the observation that the debtor "may be unavailable" or "unwilling to testify." The Conference Report also states that subsection 894(c) was included on the basis of the same consideration as subsection 892(c).

Thus, Congress set out a specific method by which the Government could prove a victim's state of mind if he were unavailable and, by contrast with other provisions in the same statute, made this the sole and exclusive method of such proof. This case presents an important issue in the interpretation of this new federal statute[14] that should be resolved by this Court for the guidance of all concerned.

4. The question concerning the admissibility of evidence that Saperstein died of arsenic poisoning presents a serious due process issue which should not be permitted to pass unreviewed by this Court. Initially, a panel of the Court of Appeals unanimously reversed on this point in an opinion by Judge Aldisert. United States v. De Carlo, 445 F.2d 911, 916 (3d Cir. 1971). The Government's petition for rehearing en banc was granted and the full court reversed the initial panel determination with Judges Aldisert and Kolodner (from the original panel), dissenting and Chief Judge Seitz (also from the original panel), concurring. The

14. The statute was held constitutional by this Court in Perez v. United States, 402 U.S. 146, 28 L. Ed.2d 686, 91 S. Ct. 1352 (1971).

majority concluded that Saperstein's death by arsenic poisoning was relevant to show his state of mind, since the jury could infer that he committed suicide due to his fear of petitioner and the other defendants. The flaw in this reasoning, however, is that there was absolutely no proof that the arsenic was ingested voluntarily with suicidal intent, just as there was no proof that it was taken accidentially or that it was administered by others so as to constitute murder. Each of these possibilities was as likely a conclusion as the other. Accordingly, the jury was left to speculate as to the cause of the poisoning, just as the Court of Appeals speculated in concluding that the evidence tended to show suicide. As Judge Aldisert put it in his first opinion, "there was no evidence connecting appellants with Saperstein's death. Thus it was not relevant to the charges," 445 F.2d at 918, a conclusion shared by Judge Kolodner, as well (53ab).

The prejudice to petitioner flowing from the equally likely inference of murder that might be drawn by the jury seems to be glossed over on the basis that it was not harmful since petitioner's bad character was already established by other evidence in the case. But this seems to be just another way of phrasing a harmless error rule, put more forthrightly on that basis by Chief Judge Seitz in his concurring opinion. Harmlessness cannot salvage this error, however, since the entire case rested upon the testimony of Zelmanowitz whose credibility was subjected to severe attack (51ab).

Furthermore, if the evidence were remotely admissible on state of mind it should have been

the subject of a limiting instruction, which it was not. The majority below concluded, however, without discussion, that this evidence was not analogous to the Saperstein letter "and did not necessitate a separate cautionary instruction" (43ab). Thus, the evidence, in the words of Judge Aldisert, was left "to hang like an unharnessed omnipresence capable of unrestricted use by the jury" (47ab).

As indicated by Judge Aldisert, "this appeal provides an ideal vehicle for testing the appellate judicial process" since it puts the courts to the "exacting test of deciding objectively" whether petitioner received a fair trial, in the face of "overwhelming evidence" of guilt (45ab). The Court of Appeals considered the admissibility of this evidence and its bearing upon the right of every individual to "be afforded a fair trial before being convicted" (24ab) to be important enough to merit en banc consideration. It is respectfully urged that it likewise merits review by this Court to determine whether this trial fell below the standard of justice expected in federal courts and required by the Constitution.

5. The indictment in this case was defective by virtue of its numerous references to the definitions of various terms in the statute, which definitions contained multiple parts, thus making it impossible for petitioner to ascertain the precise nature of the violation alleged under the law.

Count I of the indictment charged that the defendants conspired to make an extortionate extension of credit "as defined by Section 891(6)

of Title 18 U.S.C." Count II charged the substantive offense of making such an extortionate extension of credit "as defined by Section 891(6)." Count III charged a conspiracy to participate in the use of extortionate means, "as defined in Section 891(7)," to collect an extension of credit "as defined in Section 891(1)." Counts IV, V and VI also make repeated references to these same definitions.[15] If the definitions referred to were in themselves clear and concise the indictment might not present any problem on that score. However, the definitions are all multiple in nature, thereby preventing petitioner from knowing precisely which aspect of the multi-part law he was alleged to have violated. Even a brief analysis makes the vice apparent.

Count I refers to an extortionate extension of credit as defined by §891(6). That section defines the term as follows:

> "An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person."

It can be readily seen that in this section alone there are numerous possible offenses set out in the disjunctive. Thus, the offense could involve,

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15. The Indictment may be found in its entirety at 12a-16a.

"delay in making repayment" or "failure to make repayment"; in the use of "violence" or "other criminal means"; in the causing of harm to the "person," "property" or "reputation" of any person. In this one section alone there exist 12 possible combinations which could be proven. As bad as that might be, the problem does not end there but is further aggravated by the fact that §891(6) incorporates, in turn, the definition of "extension of credit" which is found in §891(1). That section reads as follows:

> "To extend credit means to make or review any loan, or to enter into any agreement, tacit or express, whereby repayment or satisfaction of any debt or claim, whether acknowledge or disputed, valid or invalid, and however arising, may or will be deferred."

Multiple possibilities exist in this section as well.

Indeed, a simple algebraic formula applied to the variable elements in these several definitions quickly yields the result that there exist a total of 768 possible combinations!

Prior to trial petitioner moved for a bill of particulars asking the Government, among other things, to

> "set forth the precise type of 'extension of credit' as defined in 18 U.S.C. §891(1), which is referred to in this Count" (22a).

Similar information was sought as to the definitions in each count. The Government merely

replied that it was an "extortionate extension of credit." Despite counsel's argument, as above, that the definitions were confusing, the court denied any relief (53a-55a). Subsequently, and still prior to trial, the petitioner made a specific motion to dismiss the indictment due to its failure to constitute "a definite written statement of the essential facts constituting the offense charged." Rule 7(f), Fed. Rules Crim. Proc. (58a-61a, 24a). That motion was likewise denied (66a). The Court of Appeals did not rule upon this contention which was, however, fully briefed.

The indictment in this case was clearly insufficient. It totally failed to comply with Rule 7(f). Rather than referring to definitions which included a multitude of possible offenses, the indictment should have alleged the specific parts of these definitions which the defendants were alleged to have violated. Since the Government was familiar with the proof it intended to present at trial such specificity was well within its power. On the other hand, petitioner's attempts to obtain the required definiteness were continually frustrated.

While the language of the statute may be used in a general description of the offense, it must be accompanied by facts sufficient to inform the defendant of the specific offense, coming under the general description, with which he is charged. Russell v. United States, 369 U.S. 749, 761, 8 L. Ed. 201, 240, 249, 82 S. Ct. 1038 (1962), makes it clear that such indefiniteness in an indictment runs afoul of the Fifth and Sixth Amendments. To correct this clear violation of Russell and Rule 7(f), particularly in the context of this new, com-

plicated federal statute, certiorari should be granted.

Conclusion

Wherefore, for the reasons set forth herein, considered separately or when taken together, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statutory and Constitutional Provisions Involved

United States Constitution

Amendment V — No person shall . . . be deprived of life, liberty, or property, without due process of law.

Amendment VI — In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.

Statutes Involved

18 U.S.C. §891 — Definitions and rules of construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to

whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

Appendix A

(9) State law, including conflict of laws rules, governs the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

18 U.S.C. §892 — Making extortionate extensions of credit

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor.

(A) In the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person,

was incorporated or qualified to do business at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) One or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described

in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

18 U.S.C. §894 Collection of extensions of credit by extortionate means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

APPENDIX B

Opinion of the Court (Filed Aug. 6, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

v.

ANGELO DE CARLO,
DANIEL CECERE,
JOSEPH POLVERINO,
PETER LANDUSCO,

ANGELO DE CARLO, *Appellant in No. 18,705*
DANIEL CECERE, *Appellant in No. 18,706*

(D. C. Criminal No. 382-69)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued December 4, 1970

Before KALODNER, SEITZ and ALDISERT, *Circuit Judges*

OPINION OF THE COURT

(Filed August 6, 1971)

ALDISERT, *Circuit Judge.*

These appeals from convictions under the federal statute prohibiting extortionate credit transactions, 18

U.S.C. §§892, 894,[1] challenge the constitutionality and applicability of the statute and present several evidentiary questions. The constitutional attacks have been recently rejected by the United States Supreme Court, *Perez v.*

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1. These sections provide:

§892. *Making extortionate extensions of credit*

(a) Whoever makes any extortionate extensions of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor . . . at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the

Appendix B

United States, ___ U.S. ___, 9 Cr.L. 3091 (Sup. Ct., April 26, 1971), and thus need not be considered here.

Appellants were indicted and convicted by a jury on

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circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in a community of which the debtor was a member at the time of the extension.

§894. *Collection of extensions of credit by extortionate means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

three substantive and three conspiracy counts charging extortionate extensions of credit and the use of extortionate means to collect or attempt to collect the debts. The credit transactions involved, in part, business relations among appellants, one Zelmanowitz, who appeared as the government's principal witness, and Louis Saperstein, who died prior to the indictment.

Zelmanowitz had been engaged in arbitrage—simultaneous foreign purchase and domestic sale of securities—and induced Saperstein to join him. They agreed that Saperstein would invest $50,000, that bank accounts would be opened in Switzerland, and that profits would be divided. After the enterprise commenced operations, they approached appellant De Carlo for a loan of $100,000. De Carlo referred them to appellant Cecere, who, although declining to lend the money, offered to invest the sum in the enterprise in behalf of himself, De Carlo, and one Polverino. As part of their offer, a prior loan of $50,000 from them to Saperstein would be cancelled and converted into a total investment of $150,000. After cancellation of this debt, Saperstein remained indebted to appellants and others for prior and additional loans totaling $200,000. The offer was accepted and the venture proceeded with De Carlo, Cecere and Polverino entitled to 50 percent of the profits.

The arbitrage trading continued from November through December, 1967, when it was halted by the Internal Revenue Service which refused to issue tax equalization forms to Zelmanowitz. Because Saperstein was required to make principal and interest payments on his $200,000 indebtedness, he persuaded Zelmanowitz to allow him to withdraw $40,000 from the arbitrage account. This withdrawal was made on January 15, 1968, without the knowledge or consent of appellants. Later Saperstein told Zelmanowitz that he had not deposited all of the moneys advanced by appellants in the arbitrage account in Switzerland because he needed funds to repay his

other loans from them. Saperstein then disappeared. He was located in New York in September, 1968, and was persuaded by Cecere to return to New Jersey where De Carlo joined them. Saperstein was kicked, punched, and badly beaten by Cecere and an associate. De Carlo then told him that he was required to make weekly payments of $5,000 and that if all the money were not paid by December 13, 1968, Saperstein would be dead. Saperstein died on November 26 of acute arsenic poisoning.

The day before Saperstein's death he prepared a letter, the following portions of which were admitted into evidence with cautionary instructions:

> Federal Bureau of Investigation, Newark, New Jersey.
>
> Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968 I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, DeCarlo's headquarters. I was then told and given 3 months until December 13, 1968 to pay the entire accumulated amount under threat of death. Cecere, DeCarlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family—I am sure they mean to carry out this threat.
>
> Last night from my home I called DeCarlo and pleaded for time but to no avail. Over the phone De Carlo stated unless further monies was paid the threats would be carried out.
>
> Louis B. Saperstein

Appellants argue that the trial court committed reversible error in admitting these statements.

At the time this and other information was offered, the government stated to the court that it was "for the limited purpose of showing the state of mind of . . . Saperstein, during the period of the conspiracy charged."

Counsel for appellants objected on the basis that the statements were hearsay, going to proof of the facts asserted, and unreliable. The Assistant United States Attorney then said: "[T]he United States is willing to stipulate that this declarant's statements cannot be used for the truth of the matter stated, that the defense is entitled to such an instruction to the jury." Thereafter, the court told counsel that, in its view, as "much of the letters as would disclose a state of mind [would] be admissible." Judge Shaw delayed a ruling on the issue, however, for he was "confronted with the problem of how far it is humanly possible to give effective instructions to the jury that they consider [the statements] only for one particular purpose. . . ." Ultimately, the court decided to admit these portions of Saperstein's letter on the ground that they reflected his state of mind. Again appellants' counsel insisted that the information should be excluded as hearsay. And again the government argued that "[i]t doesn't come in for the truth of the contents stated."

In their requests for charge, counsel for appellants made no mention of the Saperstein letter. Nevertheless, the court, in its instructions to the jury, commented extensively on the purpose for which the statements were admitted. For example, Judge Shaw cautioned:

> The sole purpose for which you can consider this evidence is for such inference as you may draw from it as to what the understanding of Louis B. Saperstein may have been with respect to what could happen to him if he failed to make repayment of a claim by defendants. You are not to consider this letter as proof of the facts related therein.

In addition, he required the jury to sign a special form which recited:

> Further, "We, each speaking individually," and then there is a line and under that I have "did" or

"did not"—"consider such statements of Louis B. Saperstein only"—with the word "only" underscored —"for the purpose of determination of his state of mind at the time he made the statements."

In arguing objections to the charge, only Mr. Direnzo, counsel for appellant De Carlo, referred to the court's cautionary instructions:

> Again I object to that portion of your Honor's charge with reference to the Saperstein letter, with reference to the understanding of Louis Saperstein. You said its sole purpose was his understanding of what could happen to him if he did not comply, and the apprehension that he had and the fear that he possessed. Again I object to that portion of it. . . . [T]*he purpose of the letter rather than establishing his state of mind is being used to establish proof of facts contained in that letter, and I submit that that was improper, and I except to that portion of your Honor's charge for that purpose.*

(Emphasis supplied.)

Now, on appeal, appellants argue for the first time, not that the letter was hearsay, but it was inadmissible even to show state of mind. It was irrelevant, they contend, because it referred to Saperstein's mental state at the time of the writing and not at the time the credit was extended. It is true that section 891(6) of Title 18 defines an extortionate extension of credit as

> [a]ny extension of credit with respect to which it is the understanding of the creditor and the debtor *at the time it is made* that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to coerce harm to the person, reputation, or property of any person.

(Emphasis supplied.)

Moreover, while mentioning this definition, the district court's instructions did not charge that the statements were relevant as circumstantial evidence to show Saperstein's state of mind *only* at the time the credit was extended. Indeed, the special form signed by the jurors referred to "his state of mind at the time he made the statements."

We will not hold, however, that the admission of the letter, or the court's instruction thereon, constitute reversible error. First, appellants did not present to the trial judge the precise contention they press here. Second, even assuming, without deciding, that the statements would not qualify as circumstantial evidence of Saperstein's state of mind at the time the credit was extended, and assuming further that the court's instructions effectively precluded their consideration for that purpose, we have no doubt that the victim's mental apprehension at the time he wrote the letter was relevant.

Section 892(b)(3), dealing with extortionate extension of credit, and §891(6), defining the term, refer to the understanding of the debtor at the time the loan is made. Section 894, however, imposes no such limitation on the state of mind inquiry. Subsection (b) provides:

> In any prosecution under this section, *for the purpose of showing an implicit threat as a means of collection*, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, *to the knowledge of the person against whom the implicit threat was alleged to have been made*, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(Emphasis supplied).

It is clear, therefore, that the victim's mental apprehension regarding collection of the debt is relevant. The admitted portions of the Saperstein letter can be viewed as bearing

directly on this issue.[2] As the government has argued, "The statements of Saperstein contained in the portions of the letter put into evidence convey his present fears for the future safety not only of himself but of his family." [3]

We find that the district court's instructions properly charged the state of mind exception to the hearsay rule and provided the jury with sufficient guidance in making the critical distinction with respect to the purpose for which Saperstein's letter was introduced.

Appellants next argue that the credit transactions did not come within the purview of the statute because the funds were not a loan to Saperstein but a capital investment in a commercial enterprise. There is no merit to this contention. At the least, the evidence established a creditor-debtor relationship involving some $200,000, extending from appellants and their associates to Saperstein, over and above the $150,000 earmarked for the arbitrage investment.

The circumstances of Saperstein's death form the backdrop of the serious evidentiary question to which we

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2. Although §894(b) prescribes a specific method of "showing an implicit threat as a means of collection," we cannot ascribe to Congress the intent to limit such a showing to that method. Surely Congress did not intend to exclude accepted methods of proof. Compare §892(b):

> In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is *nonexclusive* and in no way limits the effect or applicability of subsection (a).

(Emphasis supplied.)

3. Indeed, it seems to us that an extortion victim's state of mind is always relevant, and, in fact, an essential element of the crime charged, which is provable as an exception to the hearsay rule. An analogy may be drawn to the Hobbs Act, 18 U.S.C. §1951 which defines extortion as "the obtaining of property from another with his consent induced by the wrongful use of actual . . . *fear*." (Emphasis supplied.)

now advert. Although it was stipulated that he died prior to trial, information that his cause of death was arsenic poisoning was presented to the jury on two occasions. In the first instance, the government called the state medical examiner who had performed an autopsy on Saperstein and who, over objections, testified as to the cause of death. The government's most plausible justification for this testimony was that it was needed to rebut inferences raised by defense cross-examination of Mrs. Saperstein that Mr. Saperstein died of natural causes resulting from excessive drinking or eating. The following questions had been asked and responses elicited on cross:

Q Were you [at the restaurant] for several hours?
A Yes.
Q And while you were there Mr. Saperstein ordered food, did he not?
A He did.
Q And he ordered some beverages?
A Yes, he was drinking.
Q What was he drinking, please?
A I don't know.
Q Well, can we say that he was drinking hard liquor?
A I think so.
Q As a matter of fact, he drank quite a bit, did he not?
A He did have a number of drinks; I don't know just how much.
Q Would it be a fair statement to say that he was quite inebriated?
A Yes, he was.

* * *

Q Incidentally, did he drive you to the Westwood [restaurant]?
A Yes, he did.
Q Did he drive you back?
A No.
Q Someone else drove?
A Someone else drove us back.

Q Was that because he had a little bit too much to drink?

A Yes.

The government contends that because this examination raised the inference that Saperstein died of natural causes due to excessive drinking, it was therefore entitled to rebut this false inference by adducing evidence through the medical examiner that Saperstein died of acute arsenic poisoning. We believe it strains logic to the breaking point to say that this cross examination raised an inference as to the cause of Saperstein's death. The reality here is that the government's use of the medical examiner's testimony, particularly in combination with the admission of portions of Saperstein's letter to the FBI could conceivably have led the jury to conclude that the appellants had murdered Saperstein.

How then is the admission of such highly prejudicial evidence to be justified in a trial charging extortionate extension of credit? The government points to the fact that in the presentation of their defense the appellants produced testimony that shortly before his death Saperstein expressed the belief that he had cancer.[4] Allegedly to rebut this

4. Witness Ostrow testified to a conversation he had with Saperstein four days before the death:

Q I direct your attention to the evening of November 22, 1968, which was the Friday before Mr. Saperstein passed away on the following Tuesday, and I ask you if you recollect having a conversation with Mr. Saperstein on that evening with respect to his having seen a doctor.

A I do, sir.

Q Would you tell us what he said to you and what you said to him?

A Yes. My door was open. I was working late, about 7:00 p.m. Mr. Saperstein walked by attired in a camel hair coat. I waved greeting—excuse me—I waved a greeting and said, "Hi, Louis. What are you doing here so late?"

He replied, "I had to come back to the office. I have had a fatiguing day at the doctor." I motioned him in. He came in and sat down, and I said, "What brought you to the

inference the government later produced the autopsy report showing the cause of death to be acute arsenic poisoning. An objection was made but overruled, the court stating: "In the light of testimony this witness has given, your objection is overruled."

The vice in the government's argument lies in its failure to consider the timing of the cancer testimony. The district court had admitted over objection as part of the government's case the medical examiner's testimony that Saperstein died of acute arsenic poisoning. At this point the admission of such testimony constituted reversible error. Yet, the defense could not be sure that its objection would be sustained on appeal. It therefore tried to overcome the effect of the admission of the government's highly prejudicial evidence as to cause of death by introducing the testimony concerning cancer. The government suggests that appellants lost the benefit of their earlier objection because they took such later action. We disagree.

After the trial court erroneously admitted the highly prejudicial evidence over proper objection, the defense had every right to attempt to mollify the effect of the government's evidence and inquire further into the issue, albeit irrelevant, opened by the government. This it could do without waiving its previous objection.

It has long been the rule that when a party's objection is made and overruled, he is entitled to treat that ruling as the "law of the case" and to explain or rebut, if he can, the evidence which has come in over his protest. Consequently, a party does not waive his objection if he meets the evidence to which he objected with other evidence which under the theory of the objection would be incompetent.

Note 4—*Continued*

doctor?" He said, "Well—he wouldn't tell me. I think he was trying to hide from me the fact that I have cancer."

I said, "Why are you guessing? Why don't you find out."

He said, "Well, he suggested that I go to the Lahey Clinic in Boston."

United States v. Modern Reed, 159 F.2d 656 (2nd Cir. 1947), *cert. denied* 331 U.S. 831 (1947); *Salt Lake City v. Smith*, 104 F. 457, 470-71 (8th Cir. 1900); McCormick, Law of Evidence §55, at 129-130 (1954); 1 Wigmore, Evidence, §18, at n.36 & 36a (3d Ed. 1970 Supp.); cf. *Trouser Corp. of America v. Goodman & Theise, Inc.*, 153 F.2d 284, at n.6 (3d Cir. 1946). That rule is applicable here.

We are also satisfied that the admission of the government's evidence was so prejudicial that it could not be cured by any instruction.[5]

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5. Defense counsel requested the court to instruct the jury:

> I charge you that Louis Saperstein died from causes not attributable to these defendants. Therefore, you are not to think about or speculate as to the circumstances of the ingestion of poison and it should play no part in your discussions, deliberations, or decision.

Judge Shaw informed counsel that he would not charge the first sentence "because there is no evidence from which it could be determined that the death was either suicide or homicide." He did agree, however, to charge that "they are not to speculate on that subject"—the substance of the second sentence in the proposed instruction. A brief colloquy ensued:

MR. QUERQUES:

> If your Honor pleases, I think if you leave out the first sentence and you put in the second, you are creating a great disadvantage for us. It is not us who introduced this evidence, it was the prosecution. And it was introduced, as we indicated when it was introduced, in a very unfair way. And we made an objection to it. We said then, and we say now, that it was not an issue in the case, had no place in the case. Once your Honor admitted it, I think the charge as we have given it to you now is one which is fair. To take out the first sentence and put in only the other is to really ask the jury to disregard the evidence that you admitted.

THE COURT:

> The evidence was—from Dr. Albano and from the other doctors—that the manner in which he—or the cause of ingestion of the arsenic was unknown. There is no positive evidence one way or the other. But if you do not care to have the substance of the second sentence charged, I will omit it.

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The government argues alternatively that the evidence of cause of death was relevant even if the defense did not open the door to the use of such evidence. The alleged relevancy, it says, is that the death by poisoning "may reasonably be inferred to be related, either directly or indirectly, to such extortionate conduct." Thus, it suggests that it may show that Saperstein committed suicide out of fear created by the defendants. Alternatively, it is contended that it tended to show that appellants actually carried out their threat to kill Saperstein.

The short answer is that there was no evidence connecting appellants with Saperstein's death. Thus it was not relevant to the charges. Even if it were remotely relevant, its use was so prejudicial as to render it inadmissible. The evidence was designed to divert the jury from its duty to decide the criminal charges before it. The extortion trial was converted into a murder trial.

The words of Chief Judge Murrah in *Sumrall v. United States*, 360 F.2d 311, 314 (10th Cir. 1966), seem particularly fitting here:

> We are, of course, loathe to reverse a case like this in the face of overwhelming evidence of guilt. Technical niceties such as these make the law appear ridiculous to the man on the street. But, "all law is technical if viewed only from concern for punishing crime without heeding the mode by which it is accomplished. . . ." In circumstances like these the question is not whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury.

Since the introduction by the government of the evidence as to cause of death constituted incurably prejudicial error, the judgments of conviction of the district court will be reversed and the cause remanded for a new trial.

Appendix B

A True Copy :

Teste :

Clerk of the United States Court of Appeals
for the Third Circuit.

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Appendix B

Opinion of the Court (Filed April 4, 1972)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

v.

ANGELO DeCARLO
DANIEL CECERE
JOSEPH POLVERINO
PETER LANDUSCO

ANGELO DeCARLO
Appellant in 18,705

DANIEL CECERE
Appellant in 18,706

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued December 4, 1970
Reargued January 12, 1972
(en banc)

Before SEITZ, *Chief Judge*, KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN, HUNTER, *Circuit Judges*

Appendix B

OPINION OF THE COURT

(Filed April 4, 1972)

ADAMS, *Circuit Judge*

Following a three week jury trial, Angelo DeCarlo and Daniel Cecere[1] were convicted of violations of 18 U.S.C. §§892, 894, prohibiting extortionate credit transactions, and they appealed. The original argument of the appeals was on December 4, 1970 and the opinion of the panel was handed down on August 5, 1971. As a result of a petition for rehearing, arguments were submitted to the Count en banc.

The points raised present vexing questions whether certain testimony, admitted into evidence as part of the government's case, should have been excluded and whether even if it were otherwise admissible it was so prejudicial that these defendants should be given a new trial. The issues are vexing not because this record permits any doubt regarding the proclivities of these defendants, but because of our abiding concern that every individual be afforded a fair trial before being convicted.

1. Factual Background

The Government's chief witness against DeCarlo and Cecere was Gerald Zelmanowitz, a securities analyst who also engaged in arbitrage.[2] Price differentiations between foreign and domestic markets are so small that Zelmanowitz required large sums of money in order to make his arbitrage operation profitable. He spoke to Louis Saperstein,

1. The trials of Joseph Polverino and Peter Landusco were severed because of their illnesses. They, therefore are not parties to this appeal.

2. Arbitrage, as practiced by Zelmanowitz, consisted of buying securities in a foreign market and simultaneously selling them in the United States. Because of fluctuating currency exchange rates and numerous other factors, stock in the same company often trades at different prices in different markets. With sufficient funds, a substantial profit can be made in this manner.

and convinced him to deposit $50,000 in a Swiss Bank to be used for the aribtrage account, with profits to be divided equally. In search of more funds for the account, Saperstein and Zelmanowitz then approached DeCarlo and asked him to lend them $100,000. DeCarlo referred them to Cecere for the funds, but Cecere turned down their request for a loan. Cecere desired instead to invest that amount of money on behalf of DeCarlo, Polverino and himself in return for 50% of the profits. As a further element of the bargain, the three agreed to cancel a loan of $50,000 which they had previously made to Saperstein and thus increase their investment in the arbitrage operation to $150,000. From Saperstein's point of view, this arrangement reduced his outstanding loans from these men to $200,000.

In its initial period, the partnership was a financial success, netting a profit of $85,000 in its first sixteen trading days. The Internal Revenue Service, in December, 1967, however, refused to issue the necessary tax equalization forms to Zelmanowitz, thereby bringing the business to a standstill. Saperstein's serious difficulties with DeCarlo and Cecere began to develop at this point. "Vigorish" payments—the term used by the parties to mean interest—on the $200,000 of outstanding debt were extremely large judging from the $800 per week interest Saperstein owed on the $50,000 debt which had been cancelled. In desperate need of funds, Saperstein told Zelmanowitz that he was in fear of bodily harm because he owed these men a considerable amount of money and convinced Zelmanowitz to permit him to withdraw $40,000 from the arbitrage account in order that he might be current with his payments to DeCarlo and Cecere. In July, 1968, Saperstein again fell behind in his payments and received a loan of $5,000 from Zelmanowitz. Later in the month, Saperstein attempted to borrow an additional $80,000 from Zelmanowitz, and after being refused, asked for $5,000 to meet the "vigorish" payment. In a state of despair, Saperstein then left.

In September, 1968 presumably because of his inability

to pay his debts, Saperstein disappeared. Cecere called Zelmanowitz in an attempt to locate Saperstein, telling Zelmanowitz that DeCarlo, Polverino, Landusco, and Cecere merely wanted to sit down with Saperstein to work out a schedule of payments. Zelmanowitz arranged to meet with Saperstein on September 13, 1968 in the Americana Hotel in New York. A meeting was arranged for later in the day between Saperstein, Cecere and a Cecere aide called Lenny. At the second meeting, Saperstein pleaded with Cecere not to harm him, and even went so far as to offer to take out a life insurance policy for $100,000 naming Cecere as the beneficiary and to commit suicide by jumping out a window in return for Cecere's not harming his family. Saperstein was then taken by Cecere and Lenny to a place owned by DeCarlo behind Weiland's Restaurant in Mountainside, New Jersey, and Zelmanowitz was told to meet them there. Zelmanowitz testified that on entering the house:

> "There was a group of people in the first room as I entered, and I heard my name called, and there is another room attached to this room which I entered, and when I got in there Mr. Saperstein was laying on the floor. He was purple. He was bloody. His tongue was hanging out of his mouth . . . I thought he was dead . . . ."

He further testified that Polverino and Cecere were kicking and punching Saperstein when he arrived. DeCarlo then entered the room at which time Cecere said to him, "This s.o.b. stole our money. I am going to kill him." DeCarlo told Cecere and Polverino to stop the beating and get outside. DeCarlo, Cecere, Polverino, Zelmanowitz and Saperstein entered a station wagon parked outside and discussed the money owed by Saperstein. After Saperstein told DeCarlo that he had no money at all, DeCarlo told him to pay $5,000 every Thursday and the entire $200,000 by December 13, 1968 or Saperstein "would be dead". Saperstein explained

that he had been paying only $3,500 per week in "vigorish" and that the maximum he could afford to pay now was $3,000. DeCarlo's reply was, "Forget about it. Bring five or you're dead". Testimony indicated that from September 13, 1968, the date of the beating, until his death from acute arsenic poisoning on November 26, 1968, Saperstein was frequently very depressed.

At some time prior to his death, Saperstein wrote a letter to the Federal Bureau of Investigation that was mailed on November 25, 1968, the day before he died. The following portions of the letter were admitted into evidence with a cautionary instruction:[3]

> "Federal Bureau of Investigation, Newark, New Jersey.
>
> "Gentlemen: I am writing you, maybe others can be helped by my plight. On September 13, 1968, I was severely beaten at a place in the rear of Weiland's Restaurant, Route 22, DeCarlo's headquarters. I was then told and given 3 months until December 13, 1968 to pay the entire accumulated amount under threat of death. Cecere, DeCarlo and Polverino, also stated many times my wife and son would be maimed or killed. Please protect my family—I am sure they mean to carry out this threat.
>
> "Last night from my home I called DeCarlo and pleaded for time but to no avail. Over the phone DeCarlo stated unless further monies was paid the threats would be carried out.
>
> Louis B. Saperstein"

2. *Defendants' Major Contentions*

DeCarlo and Cecere advance three major contentions: (1) the statute under which they were indicted is uncon-

3. Each member of the jury was also requested to sign a form which stated that the juror had considered the contents of the letter only for the purpose of determining Saperstein's state of mind.

stitutional; (2) the district court committed reversible error when it admitted into evidence the letter from Saperstein to the F.B.I., and (3) the admission into evidence of the cause of Saperstein's death was so prejudicial that defendants should be granted new trials.

A. Constitutionality of the Act

The first argument, that the statute is unconstitutional, was laid to rest in the past term of the Supreme Court. In Perez v. United States, 402 U.S. 146 (1971), the Supreme Court rejected the contentions advanced here and upheld the validity of 18 U.S.C. §§892, 894. Further consideration is, thus, unnecessary.

B. The Saperstein Letter

The second point, concerning the admissibility of the Saperstein letter, raises questions of interpretation of the Act and of the scope of the so-called state-of-mind exception to the hearsay rule. In the district court, both the Government, in offering the letter, and the court, in ruling that certain portions of it were admissible, made clear that the contents of the letter would be used solely to show Saperstein's state of mind during the period of the alleged conspiracy. DeCarlo and Cecere objected to the admission of the letter on the gounds, *inter alia*, that it was not a proper dying declaration, that the letter was prejudicial, and that they were denied their Sixth Amendment right to confront the witnesses against them. Here, they raise for the first time the additional contention that the letter was irrelevant for the purpose of proving a crime based on the statutory provisions under which DeCarlo and Cecere were indicted.[4]

4. The relevant portions of the 18 U.S.C. read as follows:

"§891. For the purposes of this chapter:

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make re-

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Hearsay is traditionally defined as an unsworn, out-of-court statement offered in court for the truth of the matter stated. *See e.g.*, 5 J. Wigmore, *Evidence* §1361 (3d Ed. 1940). Testimony relating to the state of mind of the out-of-court declarant, on the other hand, is generally not hearsay because, although the declaration is unsworn and given out of court, it is not offered for the truth of the matter stated. Doubtless, a number of out-of-court statements could have value both for the truth of the matter they contain and for the state of mind of the declarant. The Saperstein letter is such a statement.

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payment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person."

§892. *Making extortionate extensions of credit*

(a) Whoever makes any extortionate extensions of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor . . . at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepay-

Had the letter been admitted for the truth of its assertions, it would have tended to show that Saperstein was beaten on September 13th and in fact owed DeCarlo and Cecere a sum of money. It would have fallen then within the definition of hearsay, and would not have been admissible unless it came within one of the recognized exceptions to the hearsay rule. However, it was not offered for the truth of the matter stated.

When the letter was proffered, the United States Attorney began his argument by stating, "These documents are offered for the limited purpose of showing the state of mind of the victim in this case, Louis B. Saperstein * * * [I]t is our position that * * * the explanations, whether they be written or oral, of the victim of an extortion are

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Note 4—*Continued*

ment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b)(1) or (b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in a community of which the debtor was a member at the time of the extension.

§894. *Collection of extensions of credit by extortionate means*

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

admissible for the limited purpose of proving his state of mind, what fears were operating his mind." When ruling that certain portions of the letter were admissible, the district court stated, "I have also reached the opinion as to that portion of the letters which reflect state of mind, that there is an exception to the hearsay rule generally recognized, and I intend to admit in evidence that portion, deleting the material as to the amount owed him and the interest charge."

Our inquiry on this point is not ended by the determination that the letter could have shown Saperstein's state of mind, and that it was admitted solely for that purpose.[5] Certain evidence may be capable of inflaming

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

5. Defendants' Sixth Amendment argument may be disposed of at this point. Pointer v. Texas, 380 U.S. 400 (1965), established the rule that in certain situations, evidence admissible as an excep-

the passions of the jury to the point that when the probative value of the evidence is weighed against the potential prejudice, it should be excluded notwithstanding it would otherwise be admissible.

Undue prejudice to the defendants from the admission of the Saperstein letter could arise only if the jury considered the statements contained therein for the truth of their assertions rather than for their value as showing Saperstein's state of mind. Similarly, the probative value properly accrues when the jury considers the letters only with regard to the state of mind of the writer. The defendants contend that asking the jury to separate the concepts of state of mind and truth of the assertions is similar to requiring them to answer the classic query: "How many angels can dance on the head of a needle?"[6] For this proposition they rely on Shepard v. United States, 290 U.S. 96 (1933), and in particular on the statement by Justice Cardozo, "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." *Id.* at 104.

The facts and holding of *Shepard*, however, belie the applicability of this sentence in the context of the present case. There, the defendant was accused of murdering his wife by poison. The Government, in its rebuttal, proved a conversation between the deceased wife and her nurse during which the wife said, "Dr. Shepard has poisoned me." *Id.* at 98. The Government contended in the district court that the conversation was admissible as a dying declaration, and that it should come in for the truth of the matter

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Note 5—*Continued*
tion to the hearsay rule should be excluded because if it were admitted, the defendant would be denied his right to confront the witness against him. Rather than proving the truth of the matters asserted, the letter was admitted to prove Saperstein's state of mind. The Saperstein letter, thus, was not hearsay in the context of its admission, and, the Sixth Amendment was in no way infringed.

6. "Quodlibet ascribed to various medieval theologians, c. 1400." *A New Dictionary of Quotations* 41 (H. Mencken, Ed. 1946).

asserted. The district court admitted the evidence over objection and sent it to the jury on this basis. During argument before the court of appeals and the Supreme Court, the Government altered its theory and contended the statement was admissible to show the wife's state of mind in order to rebut an inference raised by the defense that she had contemplated suicide. Reversing Dr. Shepard's conviction, Justice Cardozo reasoned first that the statement was not admissible as a dying declaration because the necessary elements for a dying declaration had not been shown by the Government and second that hindsight would not suffice to make the statement admissible to show state of mind because, "The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point." *Id.* at 104.

In the present case, the record is clear that the Government had no theory other than state of mind for the admissibility of the Saperstein letter, and the Court accepted the proffer on no other basis. In the charge, the jury was instructed, "You may consider [the letter] only for the purpose of deciding whether on the part of Mr. Saperstein there was a state of apprehension and fear of harm." The judge then requested each juror to sign a pledge that he would consider the letter only to determine Saperstein's state of mind because each side conceded that any consideration of the letter by the jury for the truth of its assertions would be improper. Thus we are not confronted with a *Shepard*-type, *post hoc* rationale for the admission of evidence. Rather, the letter was admitted for a narrow purpose, the trial court properly instructed the jury concerning their use of the contents of the letter, and the jury was capable of drawing the required distinction in order that the defendants would not be unduly prejudiced.

As noted above, the defendants have raised for the first time on appeal the contention that Saperstein's state of mind at the time he wrote the letter was not relevant within the meaning of 18 U.S.C. §§891 *et seq.* They argue that the

victim's state of mind is relevant only at the time the extortionate extension of credit is made, while the letter would show state of mind at the time the letter was written —more than two months after the extortion charged by the indictment.

Because the precise issue was never presented to the district court, we may not take notice of it unless it is a plain error "affecting substantial rights." Fed. R. Crim. P. 52(b). We have grave doubts whether the claim is cognizable under Rule 52(b); however, assuming that it is, we hold that Saperstein's state of mind at the time he wrote the letter was relevant to the crime charged.

While 18 U.S.C. §891(b) defines an extortionate extension of credit as "any extention of credit with respect to which it is the understanding of the creditor and debtor *at the time it is made* that delay in making repayment * * * could result in the use of violence * * *," (emphasis added), 18 U.S.C. §894(b) states that, "In any prosecution under this section * * * evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means * * *".

Section 894(b) makes clear the relevance of the victim's state of mind concerning attempts to collect the money owed. Even if the Saperstein letter could rationally show only his state of mind when the letter was written,[7] this apprehension goes directly to the means by which the defendants attempted to collect the money he owed them,[8] and the letter was therefore admissible for this purpose.

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7. In fact, the special form signed by the jurors indicates that they considered the letter regarding Saperstein's state of mind at the time he wrote the letter.

8. Defendants never requested the district court to instruct the jury that the letter might be relevant only to Counts III, IV, V and VI of the indictment—those charging collections of extensions of credit by extortionate means—nor did they object to the charge in this regard. We do not consider the failure of the judge to so

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C. Admissibility of Medical Testimony Concerning Cause of Death

The final argument advanced by the defendants concerns testimony given by a physician as to the cause of Saperstein's death. Toward the end of the Government's case-in-chief, Dr. Edwin Albano, the State Medical Examiner was called. The defendants immediately objected, and at side bar demanded an offer of proof. In order to place in proper perspective the testimony given by Dr. Albano, it is necessary to examine in some detail the events which transpired at the side-bar conference.

The report of the autopsy which had been performed on Saperstein by Dr. Albano appears to have been in the hands of the Government, the defendants and the district court for some time prior to the conference.[9] Cecere's counsel initially objected on the ground that he believed Dr. Albano would testify that Saperstein died of acute arsenic poisoning, and that the jury would be asked to infer or would on its own infer that Cecere and DeCarlo had caused the arsenic to be administered to Saperstein. He stated that the evidence would be "grossly prejudicial in view of the fact that we have stipulated the date of death as being November 26th."

The United States Attorney then presented his offer of proof. During their cross examination of Mrs. Saperstein, the defense had brought to light that several days before Mr. Saperstein died, he had gone out to a restaurant where he ate and drank quite heavily. The Government reasoned that if the defense were attempting to raise in the minds of the jury the possibility that Saperstein died from overindulgence "as the result of a gastro condition"—which would contradict apprehension—the Government should

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instruct the jury *sua sponte* to be plain error under Fed. R. Crim. P. 52(b).

9. The Government offered the autopsy report itself earlier during its examination of Zelmanowitz. The offer was rejected, and instead the parties agreed to stipulate that Saperstein died on November 26, 1968.

be permitted to correct this misimpression by proving the true cause of death. He next argued that "if the defendants had a hand in the death of Mr. Saperstein, that would certainly be an overt act under the indictment as charged." As his third rationale for permitting Dr. Albano to testify, the United States Attorney's argument was, "If Mr. Saperstein, because of his state of fear of them, in fear of further physical punishment, [committed suicide] that that would be legally relevant and material as bearing on his state of mind."[10]

Defendants' objections to the offer of proof were overruled, and Dr. Albano took the stand. Over renewed objections, he testified that the cause of Saperstein's death was "Acute arsenic poisoning." The district court denied defendants' contemporaneous motions for mistrial.

Saperstein's death certificate, indicating arsenic poisoning as the cause of death, was admitted into evidence after a defense witness had testified that Saperstein thought he had cancer. Objections by the defendants were again overruled.

In addition, the defendants requested the following point for charge.

> "I charge you that Louis Saperstein died from causes not attributable to these defendants. Therefore, you are not to think about or speculate as to the circumstances of the ingestion of poison and it should play no part in your discussions, deliberations, or decision."

The district court refused to charge the first sentence, but offered to include the second. The defense stated that such a course of action would be disadvantageous to them, and the charge therefore omitted any reference to Dr. Albano's

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10. As transcribed in the record, this statement seems to be somewhat garbled, either because of a mistake in transcription or because in the heat of argument the United States Attorney did not completely articulate his thoughts. It is apparent that the words "committed suicide" have been omitted from the argument.

testimony.[11] The main thrust of the dissenting opinion is the failure of the trial judge, *sua sponte*, thereafter to instruct the jury that the evidence was to be "limited to Saperstein's state of mind." Defendants argue that whatever the probative value or relevance the testimony by Dr. Albano had regarding cause of death was so far outweighed by its prejudicial effect, defendants should be awarded new trials.

Before considering the relevance of, and the possible prejudice caused by, Dr. Albano's testimony, it is necessary to determine the standard by which the district court's ruling is to be judged. The weight of authority indicates that, "Determination of the admissibility of circumstantial evidence is a matter properly referred to the discretion of the trial judge and his ruling should not be disturbed except in the case of a clear abuse of discretion." United States v. Craft, 407 F.2d 1065, 1070 (6th Cir. 1969). This Court has also concluded that, "A trial judge in balancing the probative value of evidence against possible prejudicial effect is vested with broad discretion." United States v. American

11. In its summation, the defense never referred directly to the cause of Saperstein's death, and the United States Attorney only briefly alluded to it when he said, "Your [sic] further heard testimony from Dr. Albano that he performed an autopsy on the exhumed body of Louis Saperstein on the 3rd day of December, 1968 and that he reached a conclusion as to the cause of death, acute arsenic poisoning." We should note here that while the district court gave no charge specifically referring to the arsenic poisoning testimony, the jury was informed, "Now, I must caution you here, ladies and gentlemen, on these conspiracy counts I have referred to 'offense against the United States.' The only offenses which the defendants are charged with conspiring to commit are those offenses that are set forth in what I have called the substantive counts. *There is no charge of conspiracy to commit any other offense*, and each count of the conspiracy relates directly to the substantive offense in another count in the indictment." (emphasis added). In light of the cautionary instruction we hold that failure to charge *sua sponte* on the use of the testimony of death by arsenic poisoning was not plain error within Fed. R. Crim. P. 52(b).

Radiator & Standard San. Corp., 433 F.2d 174, 203 (3d Cir. 1970), (Seitz, C.J.) cert. denied, 401 U.S. 948 (1971); *see* United States v. Schireson, 116 F.2d 881, 883 (3d Cir. 1941); C. McCormick, *Evidence* §152 (1954). Rule 403 of the *Proposed Rules of Evidence for the United States District Courts and Magistrates* (Draft, November 19, 1971) reads in part: "Although relevant, evidence *may* be excluded if its probative value is *substantially* outweighed by the danger of unfair prejudice * * *" (emphasis added), thereby codifying the broad discretion vested in the disteict court. Thus, if the question whether Dr. Albano's testimony was admissible falls within the broad range of the trial judge's permissible exercise of discretion we should not distrub that ruling.

DeCarlo and Cecere assert that the testimony lacked any relevance or probative value whatsoever. We need examine only one of the prosecution's suggested justifications—that the evidence tended to show suicide—in order to dispel this contention. During the discussion of the Saperstein letter, *supra*, pp. 11-12, it was noted that for purposes of 18 U.S.C. §894 the victim's state of mind even subsequent to the initial threat of harm is relevant in determining whether Saperstein was in a state of fear regarding collection of the debt.[12] If, in fact, Saperstein had committed suicide in response to the threats of the defendants, that act would be relevant to show the victim's state of mind regarding apprehension of the use of violent means to collect the debt. The Government, however, had offered no direct evidence of suicide caused by threats, and the question with which we are confronted, therefore, is whether, in light of the evidence previously introduced, death by arsenic poisoning was relevant to Saperstein's state of mind.[13]

12. It appears that the state of mind of the victim is not only relevant to the crimes charged in the indictment, but an essential element to be proved by the Government. 18 U.S.C. §§901(6). *Compare* 18 U.S.C. §195T (the Hobbs Act).

13. An excellent definition of relevance may be found in Rule

Caught in the vortex, on the one hand, of the desirability of producing all relevant information, and, on the other hand, of excluding anything that may be unduly prejudicial, we face the task of balancing these two competing considerations.

A review of the testimony and exhibits which the jury had before it prior to Dr. Albano's taking the stand indicates that Saperstein was terrified of Cecere and DeCarlo. He had begged Zelmanowitz for moeny to meet his "vigorish" payments. Saperstein had attempted to run away from a scheduled meeting with Cecere in New York City. When that meeting took place, Saperstein offered to take out an insurance policy with Cecere as beneficiary and jump out of a window. Saperstein was then taken to Weiland's Restaurant where he was severely beaten and threatened. The testimony of Mrs. Saperstein further indicated the fear in Saperstein's mind. The evidence tends to demonstrate that Saperstein was so fearful of further physical punishment and for the safety of his wife and family that the jury could reasonably infer that he had committed suicide in order to obviate these apprehensions. Dr. Albano's conclusion of death by ingestion of arsenic was, therefore, relevant to Saperstein's state of mind as it had been developed through the testimony of Zelmanowitz and Mrs. Saperstein.

Our next inquiry must be whether the testimony in question was probative on the issue of Saperstein's state of mind, in other words, whether the fact of death by arsenic can rationally tend to show state of mind. If the jury gave credence to Zelmanowitz and Mrs. Saperstein, they could logically have concluded that Saperstein was a man possessed by fear and capable of taking extreme action in order to secure the money needed to pay his debt and to protect his family. The jury could have concluded that

401 of the Proposed Rules of Evidence, *supra*. " 'Relevant evidence' means evidence having *any* tendency to make the existence of *any fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (emphasis added).

suicide was in Saperstein's mind, and that ingestion of arsenic was one means of accomplishing that end. Thus Dr. Albano's statements could have provided one of the links in proving a necessary element of the crimes—fear on the part of the victim of the extortionate plan.

Even though the evidence may be relevant and probative, prejudice arising from its introduction may be so great that it should be excluded. The prejudice claimed by the defense is that the testimony suggested commission of a criminal act by the defendants not specified in the indictment. They argue that the jury was invited to speculate that DeCarlo and Cecere murdered Saperstein or played a role in having him killed.[14] If the evidence could serve no purpose other than to cause unwarranted speculation by the jury as to the hand which wrought Saperstein's death, we might tend to agree with the defendants. Here, however, the testimony tends to harm the defendants only to the degree that the jury believed what had already been presented to it. The evidence of death by arsenic poisoning, standing alone, could not establish that the defendants were evil individuals. In fact, if the jury were to conclude that DeCarlo and Cecere were evil men, that conclusion would be based on Zelmanowitz's testimony of the beating and the threats, not on Dr. Albano's testimony as to cause

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14. It is possible that the suggestion of murder would have been stronger had the fact of death by arsenic poisoning not been introduced. Evidence then would have shown that Saperstein was very afraid of DeCarlo and Cecere, perhaps even paranoid. He was savagely beaten on September 13th, and threatened with death by both defendants. He then wrote a letter to the F.B.I., mailed the day before he died, expressing his fear and his belief that his life was as good as ended. The following day he died. The jury might then have concluded that Saperstein had been killed.

As the trial actually developed, the inference of suicide became fairly plain. It is pertinent to note that the only evidence tending to show death by other than suicide—murder—was introduced by the defense when a nurse testified that she heard Saperstein tell a doctor in the hospital on the day he died that "someone had put some silver stuff on his food at lunch today. . . ."

of death. To the extent that proof of the cause of death led the jury to infer suicide, the conclusion was not improper were the jury to believe that the beating, the threats and the offer to commit suicide all occurred.

It is contended by the defendants, though, that the real prejudice comes from the possibility that the jury would in essence find DeCarlo and Cecere guilty of murder, and therefore decide that they must be guilty of the lesser crimes actually charged. It is to prevent juries from reasoning in this fashion that proof of uncharged crimes is generally inadmissible. A review of the leading cases discussing the rule, however, shows either their support for admitting the evidence here in question or their inapplicability in this situation. In Michelson v. United States, 335 U.S. 469 (1948), the defendant was accused of bribing a federal officer. In his defense he called a number of witnesses who testified to his good character. On cross-examination, the Government asked the character witnesses if they knew that the defendant had been arrested 27 years before on a charge of receiving stolen goods. The Supreme Court affirmed the conviction, reasoning that even though proof of prior arrest would tend to show bad character, the probative value of the testimony to impeach the credibility of the character witnesses was sufficient to permit the proof. See, United States v. Gray, ____ F.2d ____ (3d Cir. No. 71-1430, March 6, 1972). Likewise, here, the evidence served the legitimate purpose of providing a basis from which the jury could reasonably infer suicide, even though there existed the possibility that the jury might misuse the evidence.

This Court, in Virgin Islands v. Oliver, 360 F.2d 297 (3d Cir. 1966), reversed a conviction because the prosecution proved that the defendant, accused of assault and escape from custody, had once before been convicted for the same acts. Citing United States v. Sweeney, 262 F.2d 272, 277 (3d Cir. 1959), the Court stated, "If the testimony of other offenses does *no more than* show propensity to

commit a given crime it is error to admit it." 360 F.2d 299 (emphasis added). In the present case, the evidence of death by arsenic poisoning by itself did not show any propensity to commit a crime on the part of the defendants. That evidence became relevant only insofar as the jury, based on the testimony already adduced, believed that the defendants had bad character. As opposed to the prosecutor's actions in *Oliver*, the Government here did not seek first to prove the bad character of the defendants and then to prove the crimes charged. Rather, by proving the crime first, from which proof the jury was certainly entitled to infer bad character on the part of the defendants, the Government then introduced evidence which tended further to show Saperstein's state of mind.

The dissenting opinion concerns itself not so much with the evidence of death by arsenic poisoning as with the omission of a charge limiting the jury's use of the evidence. The defense did offer a point for charge in this regard, and the trial judge was willing to instruct the jury, "[Y]ou are not to think about or speculate as to the circumstances of the ingestion of poison and it should play no part in your discussions, deliberations, or decision." But, because the evidence in no way would support the first sentence of the charge that, "Louis Saperstein died from causes not attributable to these defendants," the district court properly refused to include this sentence. The defense then made clear that if both sentences were not read to the jury, they did not wish to have the second given alone. In addition, they chose not to submit an alternative charge on this subject, and did not object to the charge's lack of any reference to Saperstein's death by arsenic poisoning.

The dissenting opinion, however, views the colloquy concerning the point that was submitted as sufficient to preserve any complaint the defense might have with regard to the omission of reference to the evidence. Fed. R. Crim. P. 30 states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto

before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.*" (emphasis added). Because there existed no evidence to support it, the defense clearly was not entitled to the requested charge. In the absence of an alternative request or specific objection to the omission, it would be unreasonable to expect a judge to construe an ill-founded submission of a point for charge as a request for a limiting instruction on the use the jury might make of Saperstein's death by arsenic poisoning. Therefore, the requirements of Rule 30 have not been met, and the plain error requirement of Fed. R. Crim. P. 52(b) is squarely before us. As indicated in note 11, *supra*, when read as a whole, the district court's charge, especially that portion limiting the jury to deciding only the crimes enunciated in the indictment, sufficiently circumscribed the use the jury could make of the evidence, so that the omission could not constitute plain error.

Even if we were not bound by the concept of plain error and the proscriptions of Rule 30, we would not hold that the district court abused its discretion when it did not give a limiting charge. Following the discussion during which the judge eventually properly refused to read the entire defense point for charge, the court was presented with a choice—whether he should fashion his own charge on the evidence, or rely on the general portions of his charge which instructed the jury to consider the evidence only with regard to the crimes set forth in the indictment. *See*, note 11, *supra*. It is crucial here to understand that the district court, and not this court of appeals, was in a position to judge the impact the evidence and closing arguments of counsel had on the jury, and most important, the potential effect of any charge he might give. The evidence of death by arsenic poisoning is not analogous to the Saperstein letter, and did not necessitate a separate cautionary instruction. One unversed in the law would be tempted to read a letter for the truth of its statements,

and without being told specifically otherwise, would no doubt do so. With regard to the evidence of arsenic poisoning, however, there is every reason to believe that a charge instructing the jury to consider the evidence only as it related to the crimes alleged in the indictment, would preclude them from misusing the evidence.

We are in complete accord with Judge Murrah's statement in Sumrall v. United States, 360 F.2d 311, 314 (10th Cir. 1966), that "the question is not solely whether the appellants have been proven guilty, but whether guilt has been established according to the procedural safeguards to insure trial before a fair and unprejudiced jury." Here, however, the Government did not attempt affirmatively to prove any prior criminal records of Cecere and DeCarlo, thereby implanting in the minds of the jurors the notion that the defendants were evil men. Any such belief could have come only from the testimony of Zelmanowitz and Mrs. Saperstein properly admitted. While it was possible that such testimony could be misused by the jury, the evidence of death by arsenic poisoning served a legitimate purpose—providing a link to determine Saperstein's state of mind. Under these circumstances, it was not an abuse of discretion for the district court to permit Dr. Albano to testify as he did.[15]

Accordingly, the judgments of conviction will be affirmed.

SEITZ, *Chief Judge*, concurring.

I seriously doubt that the evidence of arsenic poisoning was admissible. However, I am now satisfied beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Cf. Schneble v. Florida, 40 LW 4299 (1972). First, the unsullied evidence of guilt

15. The same reasoning applies with equal force to the subsequent admission of Saperstein's death certificate during government cross examination of a defense witness.

was most substantial. Furthermore, the combined effect of other evidence properly before the jury was as damaging on the "murder" theme as was that of arsenic poisoning, particularly: (1) Saperstein's letter to the F. B. I. disclosing that defendants had threatened to kill him and his family, and (2) the stipulated date of Saperstein's death—one day after the mailing of the letter. Regardless of the evidence of arsenic poisoning, the jury could well have concluded that defendants in fact were responsible for Saperstein's death. Realistically, no instructions could have prevented the jurors from drawing this inference. Thus, I do not believe that the evidence of arsenic poisoning, presumably inadmissible, had any significant impact on the verdict. The best indication that the jury directed its attention to the crime charged is found in the fact that two hours after the jury retired it returned to ask the court for a review of the definition of "extortionate means."

ALDISERT, *Circuit Judge*, dissenting.

This appeal puts this court to the exacting test of deciding objectively whether a new trial should be ordered where there is overwhelming evidence that the appellants were guilty of the crimes for which they were indicted, and impressive indications that they were nefarious leaders within the internal structure of organized crime in America. As disclosed by the majority's account of appellants' sordid roles in the loanshark-extortion racket, there is little in their conduct capable of generating a sympathetic judicial environment for them and for their ilk. Thus postured, this appeal provides an ideal vehicle for testing the appellate judicial process, for the reviewing court has no authority to determine the appellants' guilt or innocence; this is the exclusive province of the fact finder. The appellate function is severely and strictly limited to a determination of whether error of law, of the type properly cognizable on review, took place in the trial proceedings. I am convinced

that such error occurred in this case, and that it was reversible error, compelling a new trial.

The precise error was that the court, having permitted, over defense objection, the introduction of evidence that Saperstein died of arsenic poisoning, failed to give the jury any instruction concerning the relevancy or materiality of this evidence. Indeed, the court at no time offered any explanation as to why the evidence was in fact admitted, even though faced with alternative justifications urged by the government and strenuously objected to by the defense. Appellants were charged with and tried for two crimes; making extortionate extensions of credit, 18 U.S.C.A. §892, and collecting extensions of credit by extortionate means, 18 U.S.C.A. §894. To prove its case, the government presented formidable testimony disclosing overt acts by the appellants of threats and actual violence to Saperstein, all of which was relevant under 18 U.S.C.A. §894(a), employing extortionate means to collect or attempt to collect the debt and punishment for nonrepayment thereof.

Because these threats and acts of violence constituted the principal thrust of the government's case, the cause of Saperstein's death was an issue not completely free of potential prejudice. Indeed, the introduction into evidence of death by arsenic poisoning was potentially generative of substantial prejudice unless accompanied by appropriate limiting instructions by the court.

The majority confine their opinion to a post-trial dissertation of how this evidence could have been considered relevant on the issue of Saperstein's state of mind. Although I am in agreement with much, but not all, of this careful exposition, the fatal deficiency in the majority's presentation is that it fails to rehabilitate the glaring procedural infirmity at trial—the failure to instruct the jury how they should appropriately consider this evidence in their deliberations. An analysis which simply discloses possibilities of relevancy *in vacuo* does not assuage the

real jurisprudential hurt: permitting this evidence to hang like an unharnessed omnipresence capable of unrestricted use by the jury, including a use which even the government now concedes to be improper.

It was the contention of the government at trial that the evidence was relevant in three particulars:

1. to counteract the inference suggested by defense cross-examination that Saperstein died of natural causes;

2. to show that defendants "had a hand in the death of Mr. Saperstein, that would certainly be an overt act under the indictment as charged;"

3. "[i]f Mr. Saperstein, because of his state of fear of them, in fear of further physical punishment, [committed suicide], that would be legally relevant and material as bearing on his state of mind."

The majority quite properly do not attempt to defend the government's first contention. The rather innocuous defense cross-examination of the victim's widow revealed that Saperstein was drinking one evening and did not drive the family car home. At trial the government contended this created the inference that Saperstein died of natural causes, thus permitting introduction of the arsenic ingestion to show the actual cause of death. I believe it strains logic to the breaking point to say this cross-examination raised a permissible inference of the cause of death. In any event, the court gave no instruction so limiting its use.

The second justification urged by the government at trial—proof of overt act under the indictment—was also not approved by the majority, and properly so, for the government itself now concedes that this evidence was neither relevant to nor admissible in the government's case in chief as proof of homicide.[1] Under the circumstances revealed

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1. At reargument the government conceded that the evidence was neither relevant nor admissible on this ground:

Judge Aldisert: I take it then that you are saying . . . you did not introduce this to show homicide.

U.S. Attorney (Stern): Absolutely.

at trial, proof of coerced suicide would have been tantamount to proof of murder. Taking another's life by poison is murder whether the deadly ingredient is unwittingly ingested by the victim as a result of the connivance of a criminal actor, or knowingly ingested, under threat, force, or duress at the hands of that actor. Of course, the government's concession has removed consideration of this as evidence of the overt act of murder or coerced suicide. The majority agree stating, "The government, however, had offered no direct evidence of suicide caused by threat, and the question with which we are confronted, therefore, is whether, in light of the evidence previously introduced, death by arsenic poisoning was relevant to Saperstein's state of mind." (Slip opinion, p. 16.) "They (the defendants) argue that the jury was invited to speculate that DeCarlo and Cecere murdered Saperstein or played a role in having him killed. If the evidence could serve no purpose other than to cause unwarranted speculation by the jury as to the hand which wrought Saperstein's death we might tend to agree with defendants." (Slip opinion, p. 17.)

But the majority would legitimate the admission of this evidence for the third reason advanced by the government at trial: "While it is possible that such testimony

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Note 1—Continued

Judge Aldisert: But are you saying that if you did, it would have been relevant?

Mr. Stern: No. . . . But I will stand by my statement that the government at no time intended to prove that these defendants murdered Louis Saperstein.

* * *

Judge Aldisert: Let me start over again. In the government's case, doing what you did do, only what you did do, in the government's case, would it have been admissible, relevant evidence to show homicide on the part of the defendants?

Mr. Stern: No.

Judge Aldisert: All right.

Mr. Stern: I suggest obviously you can't prove just because a man bought a gun, if you don't intend to prove he pulled the trigger.

could be misused by the jury, the evidence of death by arsenic poisoning served a legitimate purpose—providing a link to determine Saperstein's state of mind." (Slip opinion, p. 23.)

Assuming, without conceding, the propriety of admissibility for this limited purpose, the prejudicial trial error is that neither the government nor the trial court informed or instructed the jury that the evidence was to be so received and that their consideration was to be so restricted. This is to be contrasted with the meticulous care accompanying the introduction of the Saperstein letter as state-of-mind evidence described in Part B of the majority opinion. In introducing the letter the government stated, "These documents are offered for the limited purpose of showing the state of mind of the victim in this case." Contrariwise, when the arsenic evidence was introduced, the government insisted that it was also admissible on two other grounds—rebutting the inference of death by natural cause and proof of overt act. Both of these grounds, as heretofore observed, have now been rejected. Moreover, in the Saperstein letter, the court not only gave a limiting instruction, but insisted that, upon returning the verdict, each juror "[sign] a pledge that he had considered the

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After the trial court admitted the evidence over objection, the defense had every right to attempt to mollify the effect of the government's evidence and inquire further into the issue opened by the government. This it could do without waiving its previous objection.

It has long been the rule that when a party's objection is made and overruled, he is entitled to treat that ruling as the "law of the case" and to explain or rebut, if he can, the evidence which has come in over his protest. Consequently, a party does not waive his objection if he meets the evidence to which he objected with other evidence which under the theory of the objection would be incompetent. *United States v. Modern Reed & Rattan Co., Inc.*, 159 F.2d 656 (2nd Cir. 1947), *cert. denied*, 331 U.S. 831 (1947); McCormick, Law of Evidence §55, at 129-130 (1954); 1 Wigmore, Evidence, §18, at n.36 & 36a (3d Ed. 1970 Supp.); *cf., Trouser Corp. of America v. Goodman & Theise, Inc.*, 153 F.2d 284, 288 n.6 (3d Cir. 1946). That rule is applicable here.

letter only in order to determine Saperstein's state of mind."

I agree completely that "the letter was admitted for a narrow purpose, the trial court properly instructed the jury concerning their use of the contents of the letter, and the jury was capable of drawing the required distinction in order that the defendants would not be unduly prejudiced." (Slip opinion, p. 11.) However, the same instructions for restrictive use should have been prescribed for the arsenic evidence, the other evidence limited to Saperstein's state of mind. Further, although I do not believe that the separate juror "pledge" was necessary, such an unusual precaution for the reception of one piece of potentially prejudicial state-of-mind evidence would create an *a fortiori* situation for comparable evidence.

Nor am I persuaded that this trial error can be swept under the jurisprudential rug in the guise of trial court discretion. It may have been discretionary for this court to have received this state-of-mind evidence, but once the discretion was exercised and the evidence admitted, a mandatory duty descended upon the court to inform the jury that they did not have unfettered use of this evidence and that it had to be utilized for a limited purpose only. *United States v. McClain*, 440 F.2d 241, 245-246 (D.C. Cir. 1971). See also *Commonwealth v. Amos*, — Pa. —, 284 A.2d 748, 750 (1971); *Commonwealth v. Wright*, 415 Pa. 55, 61, 202 A.2d 79, 82-83 (1964).

Nor do I reach the question of plain error. This evidence was the subject of a specific point for charge which was duly presented and was the subject of colloquy between the court and counsel both prior to the charge as well as thereafter.[2]

2. Even accepting the majority's view, that the extensive concern generated by defense counsel did not amount to a formal objection, I am persuaded that plain error was present here as in *McClain, supra*, where the evidence was admissible for only one purpose, to prove malice in a homicide case, and inadmissible for other purposes:

We would hold that whenever evidence is admitted for a

Appendix B

In view of the government's concession that it was improper for this evidence to be considered as proof of an overt act of homicide, and the majority's suggestion that such consideration by the jury, without more, would have been prejudicial to the appellants, the failure to give a limiting instruction cannot be construed as harmless error. Clearly there is a "reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963); *Chapman v. California*, 386 U.S. 18, 24 (1967); *McClain*, *supra*, at 246.

I conclude that a new trial is necessary. Although I reach this conclusion unhappily and reluctantly, I am convinced that the federal courts are guardians of the rights of all members of society, the rich and the poor, the good and the bad. We owe them all one guarantee; the guarantee of a trial that is fairly conducted, wherein it is as important that the procedure utilized in obtaining a verdict be as just as the verdict itself.

Societal order is achieved by enacting standards of conduct, the breach of which subjects the violator to sanctions. The threat of punishment is designed to preserve this order and to deter its breach. It is the genius of the American system that before an alleged transgressor of these standards may be found guilty and thus have punishment visited on him, he is entitled to and is guaranteed an

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limited purpose, it is plain error, in the absence of manifest waiver, to omit an immediate cautioning instruction. The danger of prejudicial effect from such evidence is so great that only an immediate and contemporaneous instruction can be considered sufficient to protect defendants. As long as we continue to have rules of evidence which admit testimony for some purposes but not for others, we must guard against its misuse by the jury.

440 F.2d at 246. *Cf.*, *United States v. Carter*, 401 F.2d 748 (3d Cir. 1968), where the evidence was admissible for several purposes and inadmissible only to show disposition or propensity to commit crime.

adjudicatory process which is severely regulated and rigidly controlled by procedural rules.

Thus, although it is necessary that those who in fact break standards of conduct be punished and punished properly, it is equally necessary for society itself to observe the rules it has established for the conduct of judicial procedures.

There must be a proper vindication of both rights—society's right that its standards of conduct, or laws, be obeyed, and the individual's right that organized society respect the rules it has established for the conduct of the guilt-determining process. Anything less offends our tradition; and any finding of guilt under the former without a scrupulous respect for the latter yields a conviction that is infirm and legally assailable even where, as here, there is formidable suspicion, if not evidence, that those accused have long participated in a life-style of studied defiance of the standards of societal conduct.

I would reverse the judgment of conviction and remand for a new trial.

KALODNER, *Circuit Judge*, dissenting.

I join in Judge Aldisert's view that reversible error was committed when the trial court "failed to give the jury any instruction concerning the relevancy or materiality" of the Government's evidence that Saperstein died of "acute arsenic poisoning." I fully subscribe to Judge Aldisert's keen critical analysis of the impact of the trial court's error. I can only add that the trial court's failure to instruct the jury with respect to the arsenic poisoning cause-of-death evidence left it like a "dangling participle" in the rhetoric of the court's otherwise adequate charge.

I would also reverse for the reason that the trial court prejudicially erred when it permitted the Government to adduce evidence that Saperstein's death was caused by "acute arsenic poisoning."

Appendix B

The causal factor of Saperstein's death had as much relevance in this case as "[w]ho killed Cock Robin?". There was not a scintilla of evidence connecting the appellants with Saperstein's death. Moreover, the Government and the defendants had entered into a Stipulation that Saperstein had died prior to the trial, and that Stipulation was a "cut-off" as far as the cause of his death was concerned.

It cannot be challenged that the arsenic poisoning evidence, taken at the maximum, could have led the jury to conclude that Saperstein was murdered by the defendants, and at the minimum, that the defendants had driven Saperstein to suicide—self-murder. Thus the admission of the arsenic cause-of-death testimony served to convert this trial into a murder trial instead of one for violation of the federal statutes prohibiting extortionate credit transactions. Indeed, the majority here holds that ". . . the evidence of death by arsenic poisoning served a legitimate purpose—providing a link to determine Saperstein's state of mind," and that "[u]nder these circumstances, it was not an abuse of discretion for the district court to permit Dr. Albano to testify as he did."

I disagree most vigorously with that holding.

A True Copy :

Teste :

Clerk of the United States Court of Appeals for the Third Circuit.

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APPENDIX C

Judgment of the Court of Appeals Sought to be Reviewed

UNITED STATES COURT OF APPEALS

for the Third Circuit

Nos. 18,705 and 18,706

UNITED STATES OF AMERICA

vs.

ANGELO DE CARLO,
DANIEL CECERE,
JOSEPH POLVERINO
PETER LANDUSCO,

ANGELO DE CARLO,
Appellant in No. 18,705

DANIEL CECERE,
Appellant in No. 18,706

(D. C. Criminal No. 382-69)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ----- DISTRICT OF NEW JERSEY

Present: SEITZ, Chief Judge and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, ROSEN and HUNTER, Circuit Judges

Appendix C

JUDGMENT ON REARGUMENT

This cause came on to be heard on the record from the United States District Court for the ----------, District of New Jersey and was reargued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, filed March 4, 1970, be, and the same are hereby affirmed.

ATTEST:

s/ Thomas P. Louis
Clerk

April 4, 1972